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WHEN DISASTER STRIKES: THE TRIAL LAWYER'S RESPONSE TO NATURAL DISASTER

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“Civilization exists by geological consent, subject to change without notice.”

-- Will Durant, 1946

Introduction & overview

- Background and perspective
 - Big picture:
 - The other side of Marc's coin
 - Municipalities need not be insurers of last resort
 - The response to natural disaster and the defense of claims must be managed with care to minimize liability
 - Tension between responsive government and risk management
 - Overlap between response to man-made disasters and natural ones
 - Overview of presentation
-

Types of cases – fact patterns

- Landslide cases
 - Failed infrastructure
 - Your dirt on my property
 - Lateral support
 - Failure to warn
 - Flooding cases:
 - Channeling
 - Development impacts
 - Failed flood control
 - Other natural disasters?
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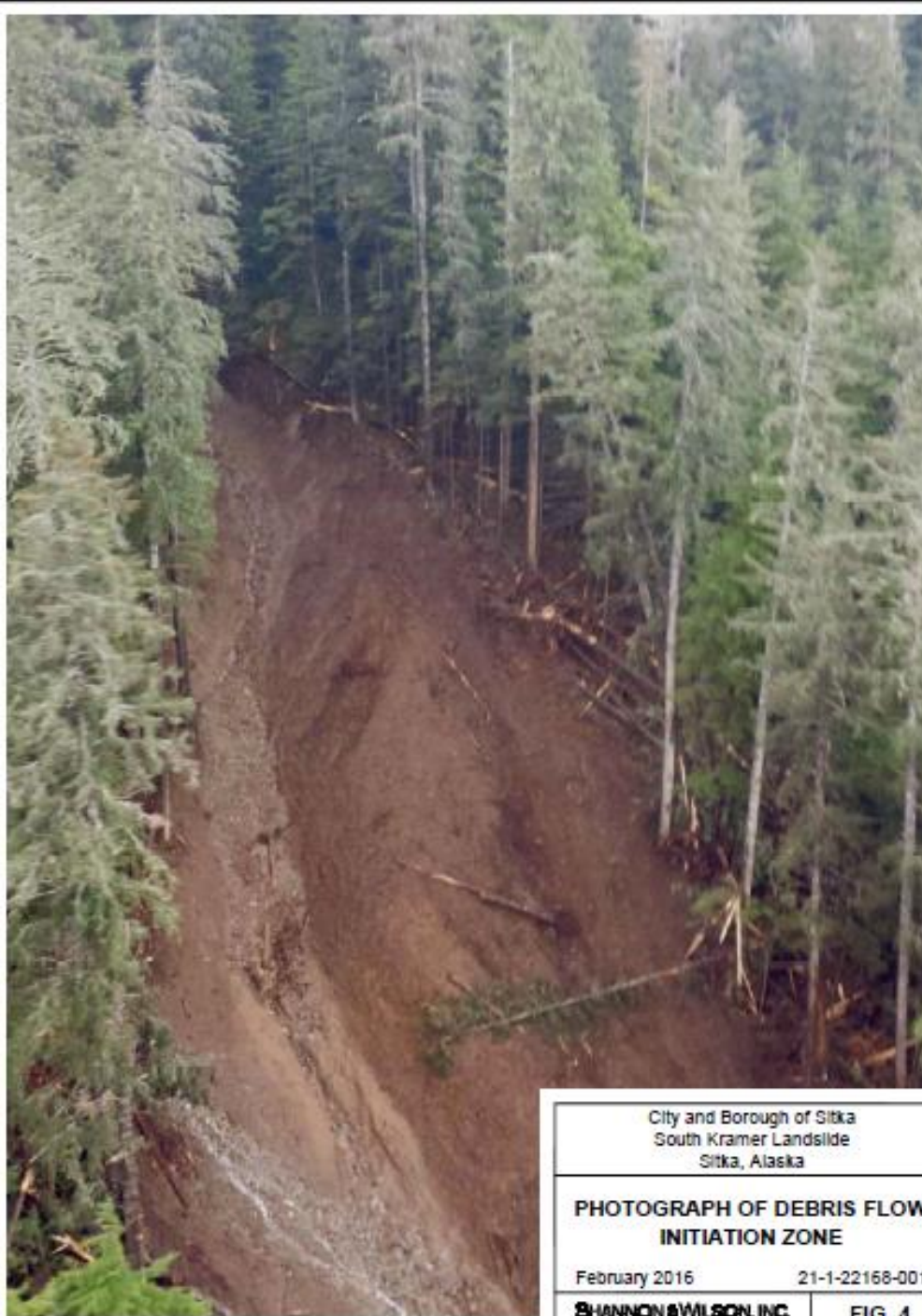












City and Borough of Sitka
South Kramer Landslide
Sitka, Alaska

**PHOTOGRAPH OF DEBRIS FLOW
INITIATION ZONE**

February 2016

21-1-22168-001

SHANNON & WILSON, INC.

FIG. 4



City and Borough of Sitka
South Kramer Landslide
Sitka, Alaska

**PHOTOGRAPH OF
DEBRIS FLOW CHUTE**

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SHANNON & WILSON, INC.
ENGINEERS, PLANNERS, AND ENVIRONMENTAL SCIENTISTS

FIG. 5



City and Borough of Sitka
South Kramer Landslide
Sitka, Alaska

**PHOTOGRAPH OF DEBRIS FLOW
DEPOSIT ON KRAMER AVENUE**

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GEOTECHNICAL AND ENVIRONMENTAL CONSULTANTS

FIG. 6

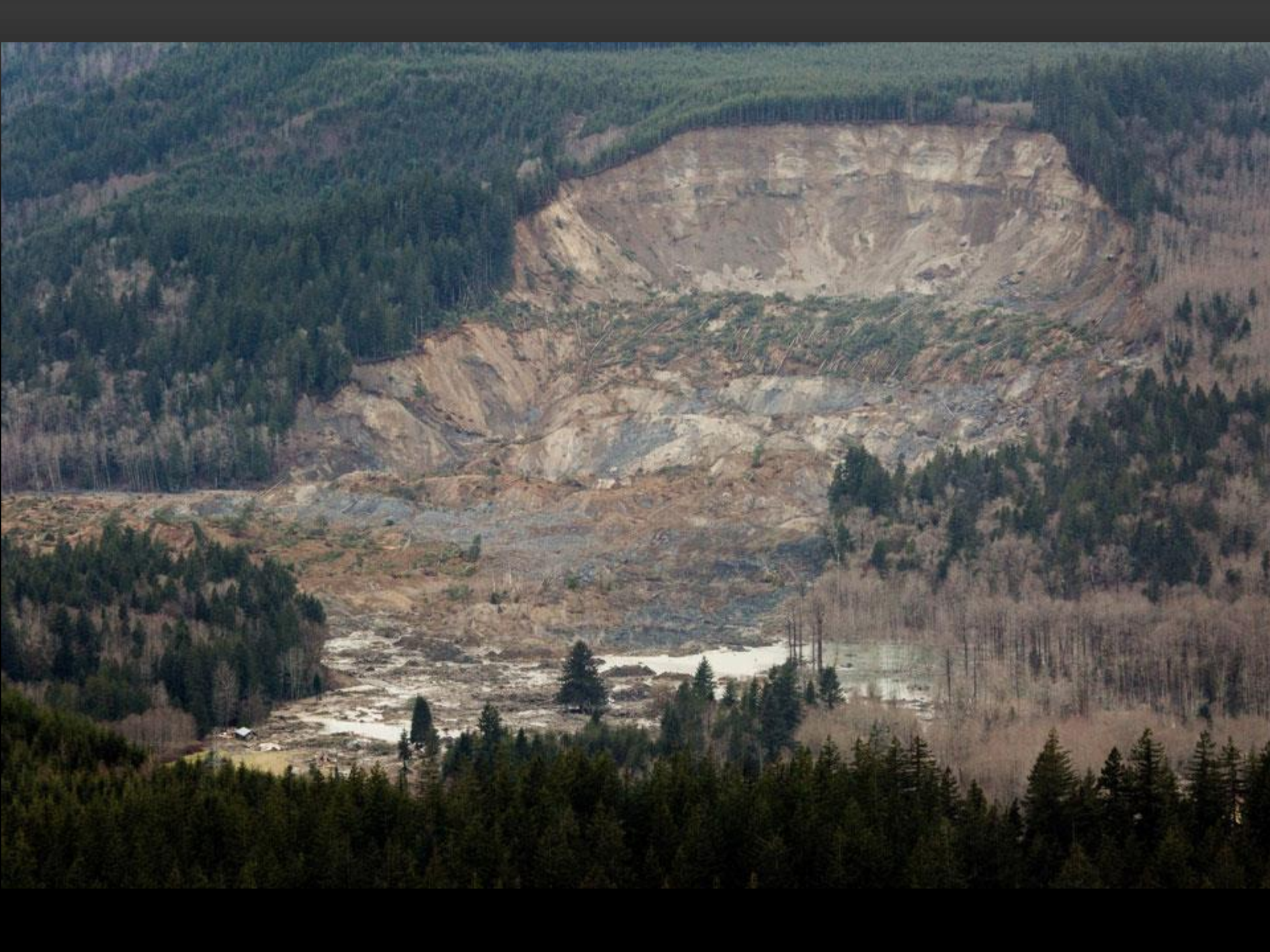












Defenses: Liability is more limited than commonly supposed

- Typically no liability for simply permitting development
 - No liability for general upland development (in some jurisdictions)
 - Policy-making/discretionary immunity
 - Immunity for flood control activities?
 - Statute of limitations – 2 years in some jurisdictions, for some claims
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Limitations on the failed infrastructure case

- Can be difficult to prove breach of duty
 - *E.g., Kempter v. City of Soap Lake*, 132 Wn. App. 155, 160-61 (2006)
- Can be difficult to prove proximate cause
 - *E.g., Nejin v. City of Seattle*, 40 Wn. App. 414, 422 (1985)

“Failure to warn”

- General rule
 - “Public duty” doctrine
 - Exceptions – grounds for imposition of a “failure to warn” duty
 - “Rescue doctrine”
 - Special relationship
 - Legislative intent and failure to enforce
 - Oso landslide example
-

Limitations on the “your dirt” case

- *Price v. City of Seattle*, 106 Wn. App. 647, 654 (2001)
 - Not enough for a landowner to have notice of “a dangerous natural condition on the land”
 - Landowner “must have notice of an alteration to the land that makes it more dangerous than if it had remained in its natural condition”
 - Compare California rule
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Inverse condemnation & its limits

- Nature of claim and examples
 - Temporary interferences are not takings
 - *Northern Pac. Ry. V. Sunnyside*, 85 Wn.2d 920, 924 (1975)
 - “Necessary incident” test
 - *Fitzpatrick*, 169 Wn.2d at 613-14
 - Conceptual limits on the claim
 - It is the inverse of eminent domain, and should be similarly limited
 - Should it ever be allowed on top of a negligence claim?
-

Assumption of risk (and related)

- Assumption of risk instruction available in some instances
 - Juries understand this defense and it ties into a core theme (at least in some cases): socialization of private risk
 - Contributory negligence and failure to mitigate
 - Pattern instructions
-

Damages – basic elements

- Damaged contents
 - Property repair
 - And/or diminution of value
 - Attorneys' fees available for certain claims:
 - Inverse condemnation
 - Statutory waste (also possible treble damages)
 - Note plaintiff will often seek a repair/diminution of value double-count
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Diminution in value

- Attorneys' fees & diminution in value are generally the primary drivers of exposure (if no fatalities)
 - Diminution in value is the *only* measure of damage available on the inverse condemnation claim
 - Important limitation: continuing torts claims should *not* support diminution in value recovery
 - *Wolsdon* & strong California authority
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Alki Condominiums v. City of Seattle

Feb 97





3/25/97



Alki Condominiums v. City of Seattle

- Mid 1980s – design and permitting
 - Early 1990s – Open Space purchase of bluff above & behind condo
 - 1996 – 1997 Holiday Storm slides
 - Plaintiff's damages
 - Costs of repair approx. \$750,000
 - Diminution in value approx. \$1.6 million
-

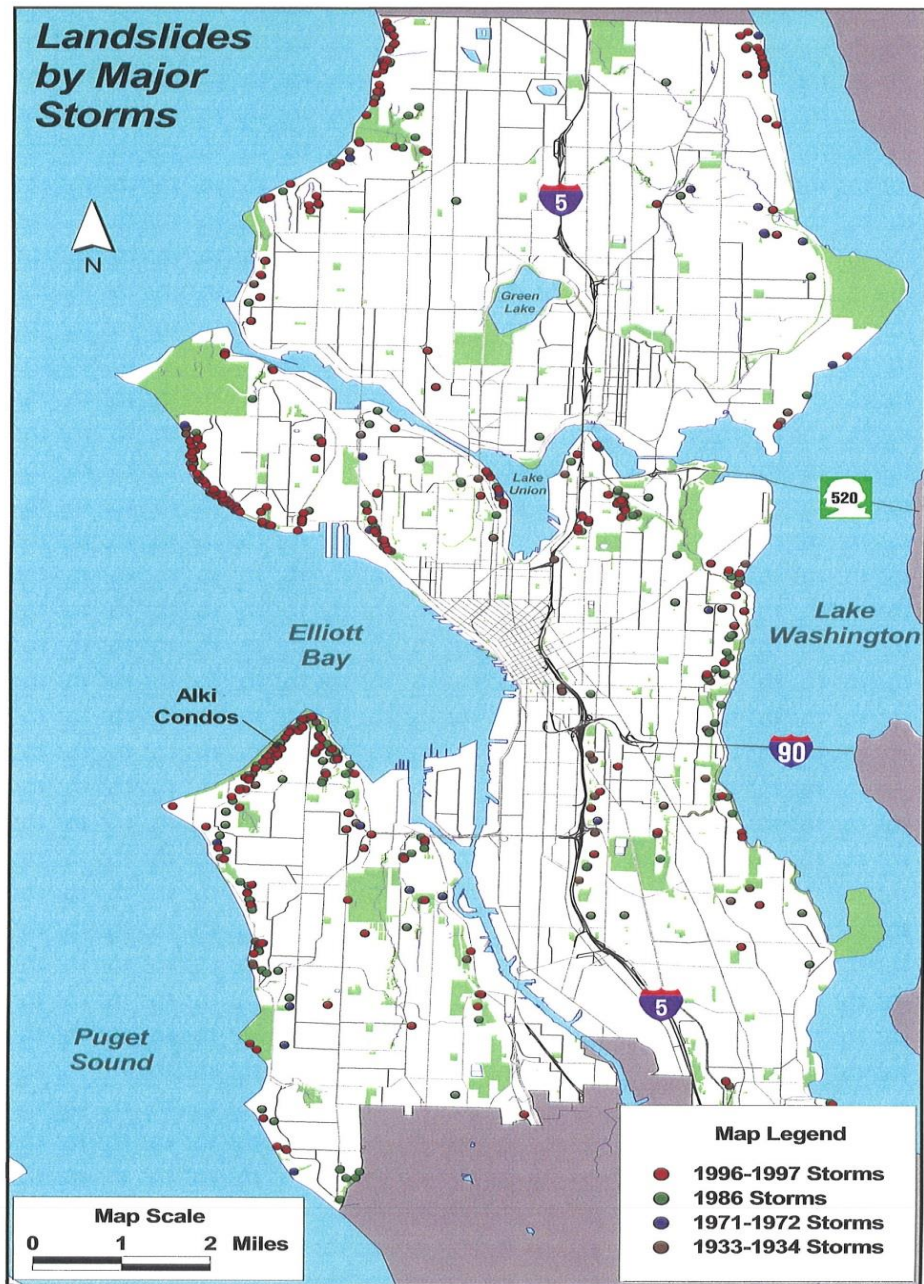
What the case was and was not about

- Not about:
 - Permitting
 - Public facilities
 - Inverse condemnation
 - Emergency response
 - After MSJ, the issue at trial was “whether a reasonable landowner would have engaged in certain actions or repairs which would have avoided the series of slides”
 - Query: can a case really be so limited?
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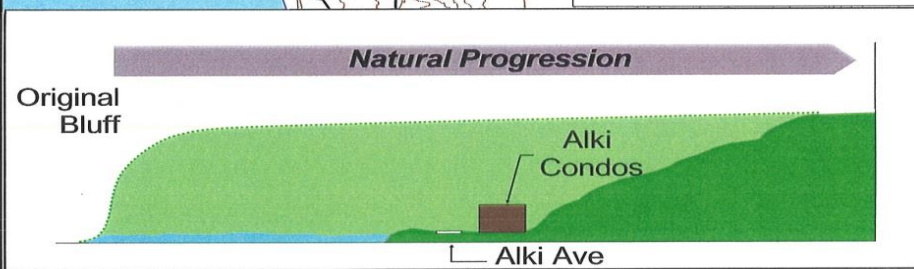
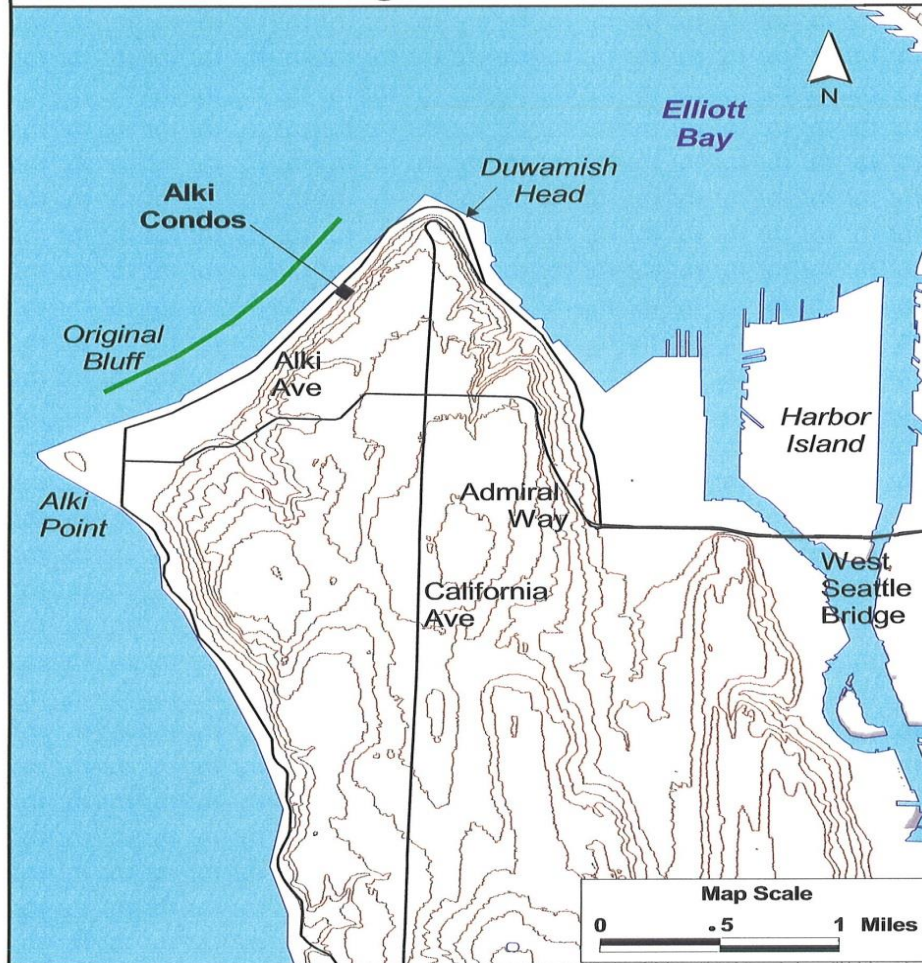
Defendant's key factual points

- Developer knew the risks & chose not to undertake all measures he could have constructed
 - Nature
 - The whole story of the storm response
 - The Open Space program
-

Landslides by Major Storms



Natural Progression of Alki Bluff



Themes

- Plaintiff's key themes:
 - The City knew and chose to do nothing
 - The City is inept
 - Defendant's themes:
 - The government can't and doesn't protect everyone all the time, and if it takes special measures to protect you, it must do so for everyone
 - You take the bad with the good when you build on waterfront & view property at the bottom of a cliff
-

Practice pointers, strategy & tactics

Make sure to tell the whole story

- Plaintiff wants to tell the story shown in the photos:
something horrible happened to me; the government caused it; and/or the government never came and never helped.
 - Tell the *whole story* of the disaster – and the disaster response
 - Plaintiffs made choices too
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Experts

- Hire early
 - Get into the science early
 - Review complaint with your in-house engineers and experts & find someone who is “with the program”
 - Consider consulting expert
 - Use good testifiers
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Creating (and managing) bad evidence

- The scenario: your client, for business/operational reasons, creates a survey of, *e.g.*, culverts
 - Good business practice vs. litigation risk
 - Need for client training on involvement of counsel and weighing of business benefit vs. litigation risk
 - Trial counsel need to get involved with their client engineers, etc., early to be forewarned on what is out there that might bite them
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Après le delugé

- Litigation is not the only thing that follows disaster
 - Do something! -- Study & regulation
 - Say something! -- Meetings and advice
 - Fix something! -- Public works
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Words of caution

- Do something! -- Study & regulation – Don't go too far
 - Say something! -- Meetings and advice – The teaching of *Pszonka*
 - Fix something! -- Public works – The Sheehan rule
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